

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

SAO No. 45 of 1999

Date of Decision: 11.10.2006

Gandhrab Raj Sharma

...Appellant

Vs.

Daulat Singh & Ors.

...Respondents

CORAM Hon'ble Mr.Justice Vinod K.Sharma

Present: Mr.Arun Jain, Advocate,
for the appellant.

Mr.Parveen Kumar, Advocate,
for the respondents.

Vinod K.Sharma, J. (Oral)

Present appeal has been filed against the order dated 16.9.1999 passed by the learned Additional District Judge, Hoshiarpur vide which learned lower Appellate Court has set aside the findings recorded by the learned Trial Court and has remanded the case back to the successor court of Shri Jagnahar Singh, Civil Judge, Hoshiarpur with a direction to appoint a Local Commissioner of revenue Department not below the rank of Kanungo and direct him to report whether site adjoining the property of the plaintiff is the ownership of the defendants or part of the street and thereafter decide the suit afresh.

The appellant-plaintiff had filed a suit for permanent injunction restraining the defendant-respondents from setting up any Barbed wire fencing or wall on the line AB in front of the western side of the property of the plaintiff situated in Gali Dhobian, Phagwara Road, Hoshiarpur as detailed in the head note of the plaint. The case set up by the appellant-plaintiff was that he along with his relations was co-sharer in Khasra No.4095/196 and other Khasra numbers situated in the revenue estate of Village Sutheri. In a family settlement arrived at in between the parties along with his other co-sharers, the plaintiff was given property i.e. 11/1/2 Karams touching on the northern and southern sides and 24 Karams on the eastern and western sides out of Khasra No.4095/196 in lieu of his share in other properties. It was the case of the appellant-plaintiff that he constructed his house and shops on the northern part of the property fallen to his share after obtaining permission from the Municipal Committee in the year 1978 and raised construction accordingly. The plaintiff-appellant claimed that there was a vacant plot of the plaintiff on the southern side of his constructed building and the same is used as court-yard. The plaintiff has enclosed it with with barbed wire fencing and that the plaintiff is enjoying that plot from the western passage. The plaintiff-appellant has also kept opening in the southern side of the building connecting the vacant plot. The case of the plaintiff-appellant was that the defendants had started asserting that they have their property abutting on the western side of the vacant plot of the plaintiff and are going to put barbed wire fencing in front of it with the object of closing approach from the western road to the vacant plot of the plaintiff. The defendant-respondents have no right, whatsoever, in the property on the western side of the plot of the plaintiff.

The property on the western side of the plot of the plaintiff is part and parcel of metalled road.

On the notice having been given, the defendants contested the suit and admitted the ownership of the plaintiff on Khasra No.4095/196/ However, they denied that any family settlement had been arrived at between the plaintiff and its co-sharers. The case set up by the defendant-respondents was that in the revenue record, the plaintiff-appellant is co-sharer only to the extent of 6 Marlas out of Khasra No.4095/196 measuring 7 Kanals 9 Marlas and that the plaintiff is in possession of more than his share in that Khasra number. It was further claimed that the plaintiff has no right, whatsoever, in the disputed site which was in the ownership of the defendants and other co-sharers of Khasra No. 191. The road abutting to the houses of the defendants and other persons is concerned, is 15/16' wide only and is a private road left by the defendants and other co-sharers. On both sides of the roads, the property of the defendants are situated. They also denied that the plaintiff has no approach from the western side to his vacant plot which is being used as kitchen garden/ courtyard. It was claimed that there is entrance on the southern side of the house of the plaintiff to the plot. Other allegations were also denied.

On the pleadings of the parties, the learned Trial Court framed the following issues:-

1. Whether the plaintiff is entitled to the injunction prayed for?OPP
2. Relief.

Learned Trial Court on appreciation of evidence came to the conclusion that Kacha portion which was in dispute was part and parcel of

the street and the same was meant for making drain. Learned Trial Court also came to the conclusion that the sale deed relied upon by the defendant-respondents was dated 11.5.1992 which was after the institution of the suit. In the said sale deed an area of 5 Sarsahis and five square feet is alleged to have been sold to Nirmal Singh son of Dhanna Singh. The said sale deed was ignored by holding that the same was hit by principles of lis pendens. It was also observed that in the sale deed no consideration was passed on before the Registrar as per recitals. Learned Trial Court also came to the conclusion that the plaintiff-appellant was in possession of the property and by relying upon Section 13 of the Punjab Municipal Act 1911 street was held to be alley or passage and accordingly decided issue No.1 in favour of the plaintiff and issued injunction directing the defendant-respondents not to raise any barbed wire and close the approach of the plaintiff.

Defendant-respondents filed an appeal against the judgment and decree passed by the learned Trial Court. Learned Additional District Judge remanded the case merely by holding that the application made by the defendant-respondents for the appointment of Local Commissioner was declined wrongly and in view of the facts of the case wherein there was dispute whether the site in dispute fell in Khasra No.191 or Khasra No.4095/196, it was necessary to appoint the Local Commissioner. Accordingly, the findings recorded by the learned Trial Court were set aside and the case has been remanded back with the directions referred to above.

Mr.Amit Jain, learned counsel for the appellant by placing reliance on the judgment of this Court in **Hasham and others Vs. Jhangi Ram (2005-2) P.L.R. 242** contends that in case the Appellate Court prima facie does not agree with the findings recorded by the learned Trial Court it

has two courses open. First is to reverse the findings on the issue or to seek report of the trial Court on such issues if deficient in any manner. In the absence thereof the remand order cannot be sustained.

He further placed reliance on the judgment of Hon'ble Supreme Court in **Hameed (D) by Lrs. & Ors. Vs. Kummottummal Kunhi P.P. Amma (D) By Lrs. & Ors. JT 2006 (7) SC 91** to contend that in the present case learned Lower Appellate Court by way of remand is permitting the defendant-respondents to fill in lacunae in this case as before the learned Trial Court they had failed to lead any evidence of their ownership.

Mr. Parveen Kumar, learned counsel for the respondents, on the other hand, contends that the appellant-plaintiff has merely claimed injunction on the basis that he was owner of Khasra No.4095/196 and the disputed portion formed part of that khasra number and is in fact part of the metalled road, and therefore, there was a dispute as to the location of a particular plot in a particular khasra number, which could only be decided by appointing Local Commissioner, and once the Trial Court has rejected the said application it was open to the first Appellate Court to accept the same and remand the case back for such trial.

I have considered the arguments raised by the learned Counsel for the parties. The order passed by the learned lower appellate Court cannot be sustained in view of the law laid down by this Court in **Hasham's case (supra)** as in the present case the lower Appellate Court has not reversed the findings recorded by the learned Trial Court on merit and has merely remanded the case back on the plea that the Local Commissioner is required to be appointed to settle the controversy between the parties after setting aside the judgment and decree. The only course open to the learned Lower

Appellate in that situation was to have sought report on the part of evidence which was considered to be necessary for just and proper adjudication of the case.

Accordingly, this appeal is allowed. The impugned order is set aside. The case is sent back to learned Lower appellate Court to pass appropriate orders in terms of the law laid down by this Court in case of **Hasham and others Vs. Jhangi Ram (supra)**.

11.10.2006
rp

(Vinod K.Sharma)
Judge